

February 25, 2008

MONTANA LOTTERY
REQUEST FOR PROPOSAL QUESTIONS & ANSWERS
RFP NO. 000014
TO BE OPENED: May 16, 2008
TITLE: MONTANA LOTTERY SCRATCH RFP AND RELATED SERVICES

Acknowledgment of Questions & Answers:

The bidder or Offeror for this solicitation must acknowledge receipt of the addendum. This page must be submitted at the time set for bid or proposal opening or the bid or Offeror may be disqualified from further consideration.

I acknowledge receipt of Questions & Answers

Signed: _____

Company Name: _____

Date: _____

Sincerely,

Chris Gabriel
Purchasing Agent

Question 1. General RFP Question

For clarification purposes, will the Lottery provide definitions for its use of the words “Offeror” and “Contractor” in the RFP document?

Answer 1. Offer: A proposal

Offeror: A person submitting a proposal when procurement is made by a request for proposal process.

Contractor: A person who agrees to furnish materials or perform work at a specified price under specified conditions.

Question 2. Section 1.6.5, Copies Required and Deadline for Receipt of Proposals, Page 9

Will the Lottery accept one electronic copy of the RFP response in the original proposal? Will the Lottery confirm that this electronic copy may be in Adobe PDF format?

Answer 2. The Lottery will accept one electronic copy in PDF format in addition to six hard copies.

Question 3. Section 2.2.2, Procurement Officer Review of Proposals, Page 10

Would the Lottery please confirm that all competitive, confidential, trade secret and proprietary information set forth in the Offerors’ proposals will not be disclosed (to the extent such information is excluded from disclosure pursuant to the Montana Code). Would the Lottery confirm that no information will be disclosed without prior notification to the Offeror?

Would the Lottery also advise what steps Offerors must take to protect valuable trade secret and confidential information?

Answer 3. Prior notification is not required to make information public. Only those items meeting the requirement of the Trade Secret Act will be withheld, and only those that are clearly marked and separated from the Offer and which have the required affidavit.

The affidavit forms are available at:

http://data.opi.mt.gov/bills/mca_toc/index.htm Search: 30-14-401

or

<http://gsd.mt.gov/docs/Tradesecretaffidavit.doc>

Question 4. Section 2.7.4, Fidelity Bond, Page 15

With respect to Fidelity Bonds, the current practice consists of obtaining an insurance policy to cover any loss to the Lottery due to any fraudulent or dishonest act on the part of any officer, employee, agent or subcontractor of the Contractor. Bonding companies are no longer writing fidelity bonds for such coverage. Will the Lottery accept an insurance policy in lieu of a surety bond?

Answer 4. No, if the contractor is unable to get a Fidelity Bond, then they need to get a Surety Bond.

Question 5. Section 2.7.6, Errors and Omissions Insurance, Page 15

In most cases Errors and Omissions Insurance is obtained by the successful Contractor. Will the Lottery confirm that the references to “Offeror” in Paragraphs 1 and 2 should in fact be “Contractor” and that E&O Insurance is to be obtained by the successful Contractor?

Answer 5. Yes, it should read “Contractor”

Question 6. Section 2.7.10, Liquidated Damages, Page 16

Would the Lottery concur that any liquidated damages amounts should comport to the actual damage, to the extent possible, and not constitute a penalty?

Would the Lottery agree to incorporate a dispute resolution process if the Contractor does not concur with any assessment of liquidated damages?

Answer 6. Liquidated Damages. If the Contractor does not provide or perform the requirements referred to in this subsection, damage to the Lottery will result. Proving such damages would be costly, difficult and time consuming. The assessment set forth below represents a good faith effort to quantify the range of harm that could reasonably be anticipated at the time of Contract signing.

Liquidated damages may be assessed at the discretion of the Lottery. Any and all liquidated damages that may be assessed by the Lottery are due within 30 days after written notification by the Lottery. The Lottery may, at its discretion, withhold liquidated damages from payments due to the Contractor. The Lottery reserves, without limitation, the right to enforce or to seek other remedies for failure to perform any contractual duty.

A. It is hereby specified that for each game whose delivery is late by one working day from the time specified in the Working Papers, for that game which is not the result of *force majeure* and which results in the delay of the scheduled start of a game, or in a shortage of tickets to distribute to retailers, the contractor may be assessed liquidated damages at the discretion of the Lottery.

B. Should the result of any test or inspection by the Lottery identify tickets that fail to meet the requirements contained in Section 3, Ticket Specifications/Game Requirements/Security Issues., RFP#, Title, Page 17 and the game tickets found to be nonconforming may be rejected at any time during the life of the game. The Lottery will specify the number of rejected tickets it wishes to have replaced and/or the number for which it wished to obtain credit. The Contractor will replace the tickets within a reasonable time, not to exceed 30 calendar days, after written notice. If the Lottery provides the Contractor with a notice of possible interruption of sales due to rejected tickets, the Contractor shall cure any such nonconforming delivery within a reasonable time, not to exceed 30 days, under the circumstances.

Question 7. Section 3, Scope of Work, General

Will the Lottery require pack inserts of any kind or oversize sample tickets? If so, how many oversize samples will be required – per game.

Answer 7. No to both.

Question 8. Section 3.3.12, Ticket Stock, Page 24

Section 3.3.12 specifies 10-point virgin card stock. Section 5, Cost Proposal, specifies Recycled/ Recyclable paper stock. Would the Lottery please confirm that the base ticket is to be manufactured using the industry standard 10-point recyclable ticket stock?

Answer 8. The Lottery would consider this card stock provided barcodes are readable. See Section 3.3.7 Ticket Back Printing.

Question 9. Section 3.3.24, Color Pulse, Page 25

In the cost proposal section pricing is requested for color pulsing scratch tickets within a game.

Our understanding of color pulsing scratch tickets is something that occurs within a game when after an initial portion of a game has been printed, the press is stopped and one or more of the colors (display and/or overprint) is changed before the next portion of the game is printed. Would the Lottery indicate how many color changes need to be included in the cost proposal (two or three). Would the Lottery prefer that the Offeror specify an additional cost for each pulse color that is changed?

Answer 9. The Lottery would prefer that the Offeror list the cost of each additional color.

Question 10. Section 3.3.25, Graphic Pulse, Page 25

In the cost proposal section pricing is requested for a graphic pulse within a scratch game.

To better establish pricing for this option, would the Lottery define exactly what is a 'graphic pulse within a scratch game'?

Answer 10. Graphic Pulse: everything changes with the exception of the prize structure, instructions, ticket back and play area.

Question 11. Section 3.3.46, Other Samples, Page 29

A) In response to this section of the RFP, it is our understanding that the 3,000 sample tickets to be provided by the Offeror will consist of multiple packs of instant game tickets. These tickets submitted are to represent the features and specifications as listed in subsections A-E of this RFP section.

B) It is also our understanding that the samples submitted under 3.3.46 A-E may be made up of the ticket sizes as outlined in Section 3.3.46.E.

Will the Lottery please confirm their specifications request for Other Samples as outlined under 3.3.46?

Furthermore, will the Lottery confirm whether such packs submitted in response to section 3.3.46 A-E will be subject for testing?

Answer 11. a. Yes

b. Yes.

See addendum for 3.3.46 E.

3.3.46 E Tickets for each game are to be consecutively numbered, undetached, and must contain bar coded information on the front and back of tickets and using UPC/EAN-13 information on the back of the ticket. Include one of each of the following sizes listed below:

1.2.5 X 4 inches

2.4 X 4 inches

3.4 X 6 inches

4.4 X 8 inches

5.4 X 10 inches

6.4 X 12 inches

There is a possibility that samples will be subject to testing at the Lottery's discretion.

The Lottery will accept two identical albums of one ticket each.

Question 12. Section 3.3.51, Travel to Press Checks, Page 30

This section states that the Contractor will reimburse the Lottery for travel, lodging and meal costs to attend press checks. However, Section 5, Cost Proposal, requests a listing of pricing for Lottery Representative's travel to the printing site. How many Lottery Representatives would be expected to attend press checks and how many times a year would the Lottery expect to attend press checks?

Answer 12. One or two people will attend a press check. However, see Section 3.3.52 Remote Sign-off. If remote sign-off is a possibility then the Lottery would make one trip per year for two people to attend a press check.

These statements do not pertain to Section 3.5.24 Security Inspection.

Question 13. Section 3.4.5.E, Shipment Standards, Page 33

In an effort to minimize the impact on the environment, would the Montana Lottery allow their tickets to travel on a truck loaded with other lotteries' tickets occasionally?

Other lotteries who would participate in this joint ticket shipment program would be limited to those lottery jurisdictions that would permit co-shipments and all

necessary shipping procedures regarding shipment custody and integrity would be developed in advance with each Lottery and adhered at each stop.

Answer 13. Yes, the Lottery would consider the possibility of shipping games with another state. Procedures will be defined with Lottery Security.

Question 14. Section 3.5.10, Laboratory Testing, Page 36

To allow vendors to accurately respond to this section of the RFP, will the Lottery please advise the number of games it anticipates submitting to a third party testing laboratory within a given year?

Furthermore, all games produced in our facility undergo stringent, industry-accepted internal testing procedures. Based on this approach to game integrity assurance, would the Lottery accept a written internal testing evaluation in lieu of an external third party test report?

Answer 14. There is the possibility that one or no game(s) will be sent for third party testing in a given year.

If the Lottery is having problems with a particular game then the Lottery may have a third party test a game.

Question 15. Section 3.5.27, Future Technologies, Page 39

Would the Lottery confirm that it is not precluding any additional pricing on advanced technological capabilities/products that may be introduced during the term of the contract by the Offeror? The pricing for these new technological capabilities/products would be mutually agreed-upon between the Contractor and the Lottery prior to the time of the Lottery's adoption and implementation of any new technology.

Answer 15. The Lottery wants assurance that the Offeror is willing to consider any future technology. The Lottery will not preclude anyone due to pricing.

Question 16. Section 3.6.1, Training, Page 40

Will the Lottery please advise the number of staff it anticipates would attend an annual vendor conference/symposium?

Answer 16. The Lottery will send two employees.

Question 17. Section 3.6.3, End of Contract Transition, Page 40

Please confirm that at the end of a contract and during any transitional period from one Contractor to the next, that any cooperation by the incumbent Contractor shall be reasonable in scope and will not pose an undue and unreasonable burden on the incumbent Contractor.

Answer 17. The Lottery is asking that the Contractor cooperate in good faith during the transition.

Question 18. Section 4.3.E, Prevailing Wages, Page 46

Would the Lottery provide an electronic/hard copy of the required Affidavit Form (or the exact location of the affidavit form) on the Montana Department of Administration's Print Services website?

Answer 18. This form is not available in electronic form, but a hard copy will be provided upon request. Contact Chris Gabriel at cgabriel@mt.gov

Question 19. Section 5, Cost Proposal, Pouching, Page 50

The Lottery requests prices for pouching, but there are no pouch specifications. Would the Lottery please provide as many specifications as possible for the pouch project, including size of ticket(s), size of the pouch, number of tickets in the pouch, pouch material type, if clear or printed material, number of colors printed, and closure method to assist in determining sample pouching pricing.

Alternatively, would the Lottery permit this option to be responded to as "to be negotiated" based on any final pouching project specifications?

Answer 19. Yes, the price can be negotiated.

Question 20. Appendix A, Standard Terms and Conditions, 4.2, Withholding of Payment, Page 74

Would the Lottery agree that if the Contractor disputes any payment withholding made by the Lottery under this Section that the dispute resolution provisions would apply in such an instance?

Answer 20. There is no dispute resolution provision in the Contract. Therefore, the State may withhold payments to the Contractor if the Contractor has not performed in accordance with the Contract.

Question 21. Appendix A, Standard Terms and Conditions, 13.3, For the Convenience of the Lottery, Page 77

We respectfully ask the Lottery to clarify whether "actual costs for services rendered as agreed" under Section 13.3 would also include any fixed costs and/or capital outlays made for performance of the contract.

As the Lottery may be aware, in order to provide for the equipment and services that are required in any contract, the successful Offeror will have to expend a substantial capital outlay that is only recovered over the full term of the contract. Any premature termination of the contract would create a substantial risk of loss for the successful Offeror, which should be compensated if the termination was not the fault of the successful Offeror.

Answer 21. No. State of Montana law requires this. The contracting agency, at its sole discretion, may terminate or reduce the scope of this contract if available funding is reduced for any reason prior to completion of project. (Ref: Section 18-4-313 (3) MCA) To date this law has not been imposed by the Montana Lottery.

Question 22. Sections 1.5.1 Acceptance of Standard Terms and Conditions/Contract

Section 1.5.2 Resulting Contract, Section 2.3.10 Commission Concurrence and Contract Signing, 2.3.13 Contract Execution Appendix A Standard Terms and Conditions, Pages 7, 12 and 70

Section 1.5.1 states that the State will make any final determination of changes to the standard terms and conditions and/or contract. Further, Section 1.5.2 states that Appendix B contains the contract terms and conditions which will form the basis of any contract between the State and the highest-scoring Offeror. However, Section 2.3.10 states that it will be the responsibility of the Apparent Successful Offeror to prepare a draft contract for the Lottery's consideration.

There seems to be a conflict as to whether there will be a contractual negotiation between the Lottery and the Apparent Successful Offeror or whether the terms and conditions set forth in Appendix B are the final terms subject to execution of a contract.

Will the Lottery please confirm that there will be an opportunity to negotiate the terms of Appendix B with the Apparent Successful Offeror after award but prior to contract execution?

Answer 22. See Addendum #1

Question 23. Section 1.7.2 All Timely Submitted Materials Become State Property, Page 9.

RFP Section 1.7.2 provides that "all materials submitted in response to this RFP become the property of the State and are to be appended to any formal documentation, which would further define or expand any contractual relationship between the State and Offeror resulting from this RFP process."

Will the State please amend the RFP to provide that the State only has the right to use the information contained in a response solely for evaluating a proposal, and, if the Offeror is awarded the contract, any and all ideas presented shall only be used in accordance with the contract?

Answer 23. Montana is an open process state. (Ref: Section 18-4-304 (3) MCA)
(4) After the proposals have been opened at the time and place designated in the request for proposals and reviewed by the procurement officer for release, proposal documents may be inspected by the public, subject to the limitations of:

- (a) the Uniform Trade Secrets Act, Title 30, chapter 14, part 4;
- (b) matters involving individual safety as determined by the department; and
- (c) other constitutional protections.

Question 24. 3.2.6.3 Hold Harmless/Indemnification. Page 13.

Will the State amend RFP Section 2.6.3 to clarify that the indemnity provisions in 2.6.3 are not intended to apply to any and all claims, liabilities, losses, damages, costs, injuries, or expenses (including reasonable attorneys' fees) arising out of or related to: (1) any act or omission of the State, the Lottery, its respective officers, directors, employees, and agents, (2) a Contractor's actions or omissions requested by or in compliance with the Lottery's requirements, or (3) any act or omission of a third party not a subcontractor of the Offeror.

Answer 24. No, this needs to remain as is.

Question 25. 2.7.3 Performance Bond; Page 14

Appendix A Standard Terms and Conditions; 12. Contract Performance Security – All Forms Accepted.

RFP Section 2.7.3 does not refer to a particular bond form. However, in the Standard Terms and Conditions under Section 12, it is stated that the bond must be supplied on a State of Montana-designated bond form. The Bid and Performance bonds found on the Website do not contain the industry-standard and acceptable terms required by Surety Companies. It is standard practice in today's Surety Market, when writing bonds, that a bond be annually renewable; that failure-to-non-renew language be included in the bond form and contract; and that there be no forfeiture language. The majority of lotteries have accepted these changes into the bond forms and RFP and contract.

1. Are industry-standard bond forms acceptable in lieu of the Montana Bid and Performance Bond forms?
2. RFP Section 2.7.3 states that the bond shall be maintained in full force for the term of a contract. Surety companies require that a bond be renewed on an annual basis. Will the Lottery please amend this section to include that the Performance Bond can be renewed on an annual basis?
3. Will the Lottery please amend the performance section to include the following wording:

“Neither non-renewal by the Surety, nor failure or inability of the Principal to file a replacement bond in the event the Surety exercises its right to not renew this Bond shall, itself, constitute a loss to the Obligee recoverable under this bond or any extension thereof.”

4. If the Montana Performance Bond form is required, can it be amended to include items 2 and 3 above?

Answer 25. 1. Offeror must use the State of Montana bond form.

2. The bond must be in place for the term of the contract and the bond can be renewed annually.

3. The Lottery will not accept this.

4. No.

Question 26. 5. 2.7.4 Fidelity Bond.; Page 15

This section states that the Contractor will be required to maintain, during the life of a contract, a Fidelity Bond in the amount of two million dollars (\$2,000,000) to cover any loss to the Lottery due to any fraudulent or dishonest act on the part of any officer, employee, agent, or subcontractor of the Contractor.

1. A Fidelity Bond does not extend coverage to agents and subcontractors. As such, we respectfully request that the Lottery delete the words “agent, or subcontractor of the Contractor” in this section.

Answer 26. The Contractor is responsible for the actions of its agents and/or subcontractors. The Contractor needs to require that any agent or subcontractor they hire carry the same coverage that The State of Montana requires of the Contractor.

Question 27. 6. 2.7.5 Insurance;

Appendix A Standard Terms and Conditions;

8.3 Specific Requirements for Commercial General Liability;

8.4 Specific Requirements for Automobile Liability. Pages 15 and 75

Section 2.7.5 states that the limits of liability for the Commercial General Liability and Commercial Auto Liability should be \$1,000,000 per claim and \$5,000,000 aggregate. However, in Appendix A, Standard Terms and Conditions, Section 8.3, Specific Requirements for Commercial General Liability, the limits are left blank. And, Section 8.4, Specific Requirements for Automobile Liability, requires \$500,000 per person, \$1,000,000 per accident, and \$100,000 for property damage OR \$1,000,000 combined single limit.

1. We respectfully request that the Lottery please clarify the specific requirements for Commercial General Liability and Commercial Auto Liability.

Answer 27. The requirements are as stated in Section 2.7.5. Section 8.3 have the same requirements when the contract is completed for the approved Contractor.

Question 28. 2.7.11 Force Majeure; Page 17.

We respectfully request that the Lottery amend the list of Force Majeure events to include “War and Terrorism” in the first line of RFP Section 2.7.11.

Answer 28. The definition of Force Majeure includes war and terrorism. *Force Majeure* literally means "greater force". These clauses excuse a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract. Typically, *force majeure* clauses cover natural disasters or other "Acts of God", war, or

terrorism. It is important to remember that *force majeure* clauses are intended to excuse a party only if the failure to perform could not be avoided by the exercise of due care by that party.

**Question 29. 3.2.1 PDF 417 Multi-Dimensional Barcode; Page 18
3.3.6 Game Programming Capabilities; Page 19
3.3.7 Ticket Back Printing; Page 21**

In these sections, the Lottery mentions the use of the FailSafe barcode or an equal or better secure validation process. It is our understanding that a competitor has alleged that the proposed barcode makes use of intellectual property that is described in its patent.

Has the Lottery acquired a license to the competitor's patent for all potential vendors to use for printing the proposed barcodes? If so, will the Lottery provide a copy of the license to all potential Offerors?

If not, how are the other Offerors supposed to price the acquisition for such a license when the licensor is a single competitor who could, thereby, affect all pricing in this procurement?

In addition, has the Lottery received a legal opinion as to the validity and/or applicability of the competitor's patent, for all intents and purposes contemplated under the requirements of the RFP, to ensure the necessity and/or the applicability of any license to the competitor's patent? We also respectfully suggest that the Lottery include a requirement referencing that a product or process allegedly covered by a patent owned by a single vendor may be restrictive of competition and, therefore, contrary to the best interests of the State.

- Answer 29.**
1. The Lottery can purchase the use of this license annually. The Lottery is open to other technologies as referenced in the RFP, "...or an equal or better process."
 2. No.
 3. Use the "or an equal or better process"

Question 30. 3.3.41 Trademark Search; Page 28

Will the Lottery amend RFP Section 3.3.41 to provide that trademarks developed *solely* for the Lottery shall be the property of the Lottery and that the Lottery will not cause the Contractor to infringe on any trademark during any phase of developing or registering a name for the Lottery?

- Answer 30.** The Lottery has not knowingly infringed on any trademark.

Question 31. 4.1.2 Background Investigation; Page 41

RFP Section 4.1.2 provides that Apparent Successful Offerors and all individuals performing work under the contract must pass a background

investigation. Will the Lottery please provide what is contemplated for the scope of such investigation?

Answer 31. Background check will consist of criminal record checks and financial record checks for all corporate officers and staff who work on the Montana Lottery account.

Corporate due diligence will also be conducted on the corporation, particularly in the area of financial accountability.

Question 32. Appendix A – Hold Harmless/ Indemnification; Page 71

Consistent with the request in Section 2.6.3, will the State please amend this section to provide that indemnity provisions are not intended to apply to any and all claims, liabilities, losses, damages, costs, injuries, or expenses (including reasonable attorneys' fees) arising out of or related to: (1) any act or omission of the State, its respective officers, directors, employees, and agents, (2) a Contractor's actions or omissions requested by or in compliance with the Lottery's or State's requirements, or (3) any act or omission of a third party not a subcontractor of the Contractor.

We believe that this exemption is consistent with Montana law. Further, this amendment will eliminate the need to determine the scope of the indemnity provision in a court of law.

Answer 32. Pending attorney opinion.

Question 33. Appendix A Standard Terms and Conditions; 8.7 Certificate of Insurance/Endorsements; Page 75

Insurance policies contain information that is highly confidential. Standard industry practice is to accept certificates of insurance as evidence of the insurance coverage in force.

Will the Lottery delete the last sentence in Section 8.7 of the Standard Terms and Conditions as noted below:

"The State reserves the right to require complete copies of insurance policies at all times"

Answer 33. No

Question 34. Appendix A Standard Terms and Conditions; 11.1 Third party Claim; Page 76

Will the Lottery please confirm that the Contractor may exercise the options regarding patent infringement as set forth in Section 2.6.3 of the RFP and that Section 11.1 of the Form Contract should be amended to be consistent with Section 2.6.3?

Answer 34. Pending attorney opinion.